UNITED STATES BANKRUPTCY COURT

DISTRICT OF HAWAII

In re	)	Case No. 97-03746
	)	Chapter 11
UPLAND PARTNERS, a Hawaii limited partnership,	)	
	)	Re: Docket No. 2847
Debtor.	)	
	)	

MEMORANDUM DECISION REGARDING
OBJECTION TO CLAIM NOS. 36, 37, 45, 46, 47, 48

Since the early 1960's, William S. Ellis, Jr. ("Ellis") has attempted to develop the "Kulamanu Project" on the island of Maui. Unfortunately, Mr. Ellis and his associates have expended considerably more effort in fighting with one another and their creditors than in actually developing the project. This decision concerns claims filed by creditors who lent money or provided services in connection with the development project in the 1980's and who were never paid.

P.F. Three Partners ("P.F. Three") filed objections to the claims on April 24, 2004. Mr. Ellis joined in the objections. The basis of the objections is that the claims are time barred and are not liabilities of the debtor. A hearing was held on July 12, 2004. The objecting parties demanded an evidentiary hearing on the objections. At the conclusion of the hearing, I directed the objecting parties to file in written form all evidence that would be presented at an evidentiary hearing, through declarations, and a supporting memorandum.

After reviewing the supplemental documents submitted by the objecting parties, I conclude that there is no need for an evidentiary hearing, claim nos. 36, 37, 45, 46, 47, and 48 should be allowed, and the objections should be overruled.

Background

Claim no. 36 filed by the Hugh Menefee Development Corporation claims an unsecured debt of $72,559.16. This claim amends previously filed claim no. 7 and is for money allegedly loaned. P.F. Three objected, asserting that the claim is time barred, lacks adequate supporting documentation, and the obligor is Upland Associates, not the debtor.

Claim no. 37, which amends claim no. 11, was filed by Taylor, Leong & Chee. The claim is for an unsecured debt of $59,473.84 for legal services provided by Taylor, Leong, & Chee to Richard Ferguson, who at the time was working with Mr. Ellis on the development project. P.F. Three and Mr. Ellis state that the claim lacks adequate supporting documentation and is against Mr. Ferguson and Maui Land, not the debtor.

Claim nos. 45-48 were filed by creditors Oneil Eugene Long, Jr. and Sara Moreland Long, Trustees of the Gene and Sara Long Family Trust, Roy Kesner, and William Lemke (collectively referred to as the "Long Creditors"). The claims

amended claim nos. 26, 27, 28, and 29. Claim nos. 45 and 48, filed by Sara Moreland Long and Oneil Long, are for unsecured debts of $219,000 each. Claim no. 46 filed by Roy Kessner is for an unsecured debt of $43,800. Claim no. 47 filed by William Lemke is for an unsecured debt of $43,800.

At the crux of the dispute is a letter agreement dated March 17, 1993, entered into by Quadrant Holdings Pty. Limited ("Quadrant"), Mr. Ellis, Upland Partners (the debtor here), and Kula-Olinda Associates ("KOA") regarding the settlement of certain pre-existing disputes and the development of the Kulamanu Project. On March 17, 1993, Mr. Ellis, Upland Partners, and Quadrant also entered into a Second Amended and Restated Kulamanu Development Agreement ("SARKDA") which was an exhibit to, and incorporated by reference in, the 1993 letter agreement. Among other things, the letter agreement provided that Mr. Ellis and Upland Partners jointly and severally agreed to assume, pay, and otherwise discharge, among other debts, all amounts due and owing to Taylor & Leong (the predecessor of Taylor, Leong, & Chee), the Long Creditors, and others. The relevant parts of the agreement read:

> 8. Ellis and Upland Obligations. Ellis and Upland, jointly and severally, agrees to assume, pay and otherwise discharge the following:
>
> a. Ellis' and Upland's obligations under the Second Amended

and Restated Kulamanu Development Agreement;

b. All amounts due and owing to Kula-Olinda Associates, Ellis, Brower & Brower, Taylor & Leong, Long, Kesner and Lempke, Walter R. Schoettle, Esq. or others generated in connection with the Kulamanu Project;
c. Any amounts due and owing to Austin, Tsutsumi & Associates or Johnson Tsushima Luersen Lowrey generated in connection with the Kulamanu Project and which are not otherwise covered by the Second Amended and Restated Kulamanu Development Agreement;

d. Any amounts due and owing to Inter-Island pursuant to any agreements between Kulamanu Developers and Inter-Island; and

e. Legal, appraisal, financing and sales fees and costs incurred by Ellis and Upland in connection with the development of the Kulamanu Project.

It is the intention of paragraphs 7 and 8 of this letter agreement that Quadrant shall only be liable to pay the specific costs enumerated in paragraph 7 above and that all other costs, expenses, claims, obligations and demands which have arisen in connection with the Kulamanu Project shall be assumed, paid and otherwise discharged by Ellis and Upland.

Discussion

A. The Creditors Are Third-Party Beneficiaries Of The 1993 Letter Agreement And Are Entitled To Enforce That Agreement

The creditors argue that the 1993 letter agreement make them creditors of the debtor and also started a new limitations period on their claims. P.F. Three and

Mr. Ellis argue that the creditors are not entitled to the status of third party beneficiaries of the 1993 letter agreement and therefore cannot enforce the agreement.

A third-party beneficiary is defined as "a person who, though not a party to a contract, stands to benefit from the contract's performance." Black's Law Dictionary 165 (8th ed. 2004). The rights of the third-party beneficiary are limited to the promise which may be expressly stated in the contract or implied from surrounding circumstances. U.S. Pacific Builders, Inc. v. Mitsui Trust & Banking Co., 57 F.Supp.2d 1018, 1026 (Haw. 1999). The intended beneficiary need not be specifically or individually identified in the contract, but must fall within a class clearly intended by the parties to benefit from the contract. Id. One way to ascertain such intent is to ask whether the beneficiary could reasonably rely on the promise as manifesting an intention to confer a right on him or her. See Restatement (Second) of Contracts § 302(1)(b) (1981). Furthermore, the parties to the contract must have intended directly to benefit the third party. Id. The primary question in determining whether a non-signatory to a contract is a third-party beneficiary is "whether the agreement manifests an intent to benefit a third-party." Id. See also Klamath Water Users Protective Assoc. v. Patterson, 204 F.3d 1206, 1211 (9th Cir. 2000); Restatement (Second) of Contracts § 302(1)(b) (1981).

It is also important to distinguish an intended third party beneficiary from an incidental third party beneficiary. A promisor owes a duty of performance to any intended beneficiary of the promise, and "the intended beneficiary may enforce the duty," Restatement (Second) of Contracts § 304 (1981), whereas an incidental beneficiary acquires "no right against the promisor or the promisee." Restatement (Second) of Contracts § 315 (1981). An incidental beneficiary is a person who will be benefitted by performance of a promise but who is neither a promisee nor an intended beneficiary. Id.

The creditors here were not parties to the 1993 letter agreement. The letter agreement specifically provides, however, that Upland Partners and Mr. Ellis would pay the creditors.[1] Even if (as Mr. Ellis testified) the creditors did not know of the agreement when it was made, the plain language of the agreement manifests an intent to benefit the creditors. As such, the named creditors are intended beneficiaries because Upland Partners specifically provided to pay these creditors,

[1] In his declaration, Mr. Ellis asserts that the 1993 letter agreement was the third in a series of cumulative workout agreements involving the development of the Kulamanu Project and that only the claims listed in Exhibit B to the First Workout Agreement dated October 7, 1988, were intended to be included in the 1993 letter agreement. See Declaration of William S. Ellis, Jr., In Compliance With Docket 2995 Minute Order ¶ 21-23. This testimony is inadmissible under the parol evidence rule. The 1993 letter agreement unambiguously identifies the claims that Upland and Mr. Ellis would pay and does not mention, let alone incorporate, any limitation on payment contained in any prior agreement.

and thus these creditors can enforce their right to payment.[2]

B. Even Though Quadrant Breached The Agreement, Upland Partners Is Not Excused From Performing

P.F. Three and Mr. Ellis assert that Quadrant breached the 1993 letter agreement. They argue that the promise to pay the debts mentioned in the 1993 letter agreement and SARKDA was conditional and did not become a legally enforceable obligation because the conditions were not fulfilled by Quadrant.[3]

"Modern courts and the Restatement (Second) of Contracts recognize that something more than a mere default is ordinarily necessary to excuse the other party's performance in the typical situation." 14 Williston on Contracts § 43:5 (4th ed. 2004). The general rule is that a party may suspend or discharge his or her duty to perform only if the other party's failure to perform is material or substantial.

---

[2] Mr. Ellis states that Taylor & Leong and the Long group have "obviated the underlying intent and purpose of paragraphs 8.b and 8.c of the March 17, 1993 document by decimating KOA". In particular, Mr. Ellis complains of positions taken in this bankruptcy case by Taylor & Leong and the Long group with whom Mr. Ellis disagrees and which Mr. Ellis believes reduced the recovery of Kula-Olinda Associates, a junior secured creditor in which Mr. Ellis has an interest. See Ellis Declaration at ¶ 31. Even if it were true that the creditors "decimated" Kula-Olinda Associates, that would not give Upland a defense to the claims.

[3] P.F. Three and Mr. Ellis assert that the record in this case suggests that $142,000 of the $192,705.91 which includes $95,515 and $33,537.33 owed to the Long group and Taylor & Leong, respectively, was actually paid. See Ellis Declaration at ¶ 29. This statement is hearsay and inadmissible against the creditors because it is vague and is based on Quadrant's statement of what was paid and not Mr. Ellis' own statement.

Thus, if the prior breach of the contract was slight or minor, as opposed to material or substantial, the non-breaching party is not relieved of his or her duty of performance, although he or she may recover damages for the breach. Stated differently, a breach of contract which is only "partial," as opposed to "total," will not relieve the other party from his or her obligation to perform. Id.

Thus, a party who has materially or substantially breached a contract may not insist upon the performance of the other party. The non-breaching party's duty to perform is excused only if the breach or the failure to perform contractual obligations is material. If either party commits a material breach of a bilateral contract, the party should be excused from the obligation to perform further. "Such a breach amounts to the nonoccurrence of a constructive condition of the exchange and justifies the injured party's suspension of performance and the termination of the contract." See 17A Am. Jur. 2d Contracts § 685 (2d ed. 2004).

The 1993 letter agreement provides, in paragraph 3, that Quadrant would release a lot designated as lot 219-D from the GECC mortgages, "when Lot 219-D is a separate Land Court lot." Although Lot 219-D became a separate Land Court lot on August 15, 1995, Quadrant did not release Lot 219-D from the GECC mortgages until May 31, 2000. In adversary proceeding no. 99-0081, this court determined that although Quadrant failed to perform its obligations under the

agreement, Mr. Ellis, Upland Partners, and KOA failed to prove by a preponderance of the evidence that they suffered any damages as a result of Quadrant's conduct. The court further concluded that Quadrant was not the cause of the inability of Mr. Ellis and Upland Partners to develop the Kulamanu Project and pay successfully the debts which the 1993 letter agreement imposed upon them. Thus, Quadrant's breach was not material or total and did not extinguish Upland Partner's assumed obligation to the creditors.

P.F. Three also argues that Upland Partners' obligation to pay the assumed debts was conditioned upon Quadrant's performance. This argument flies in the face of the plain language of the 1993 letter agreement. Upland Partners' promise to pay the claims was unconditional.

C. The Claims Are Not Time Barred Because The 1993 Letter Agreement Acknowledged The Debts And Started A New Statute Of Limitations Period

P.F. Three and Mr. Ellis argue that the debts represented by these claims were time barred by 1993 since they date back to 1986, more than six years under the applicable Hawaii contract statute of limitations.

A promise to pay all or part of an antecedent debt owed by the promisor is binding if the indebtedness is still enforceable or would be except for the effect of a statute of limitations. Restatement (Second) of Contracts § 82 (1981). The new

promise may be express or implied. If the promise is express, it may be conditional or unconditional, but if conditional, it is not effective until the condition is performed. See First Hawaiian Bank v. Zukerkorn, 2 Haw. App. 383 at 385, 633 P.2d 550 at 552 (1981); Pai v. First Hawaiian Bank, 57 Haw. 429, 558 P.2d 479 (1977).

The 1993 letter agreement contains the debtor's express promise to pay the time-barred debt. The promise was not conditional because both parties were required to perform simultaneously. No where in the document is it specified that Upland Partner's performance was conditioned upon Quadrant's release of the GECC mortgages. P.F. Three has presented no evidence to rebut the new promise. Therefore, the 1993 letter agreement re-started the statute of limitations and the claims are timely, valid, and allowed.

Conclusion

The 1993 Agreement, which started a new statute of limitations period, unambiguously provided that Mr. Ellis and Upland Partners were to pay creditors Hugh Menefee Development Corporation, Taylor, Leong & Chee, and the Long creditors. Even though Quadrant breached the agreement, the contract was not terminated and the debtor must still perform. A separate judgment overruling the

objection to claim nos. 36, 37, 45, 46, 47, and 48 shall enter.

DATED: Honolulu, Hawaii, January 5, 2005.

/s/ Robert J. Faris
United States Bankruptcy Judge